Newsletter of the Utah Prosecution Council

The PROSECUTOR

Director's Thoughts

Insanity?

Grandparents have been known to do crazy things for their grandchildren. Traveling to North Dakota in early February falls under that category. When Betta, who was suffering serious angst from not having seen the ND grandkids since last summer, reported she had found some inexpensive airline tickets to Minot, I fell right in line. Hey, I grew up on the Uinta Basin where they have real winter. How much worse could North Dakota be? Right!

We landed in Minot at about 11:00 p.m. After collecting our luggage and getting the keys for the rental car – along with general directions as to how to find it – we walked out of the terminal door. At 15˚below zero, a 25-30 mph wind doesn't hurt; it feels like it's taking your skin off. After half an hour (actually, it was probably 10 minutes or less) wandering around the rental lot, we found our car. At least it started. One guy's, who was out there with us, did not.

During our 4½ day stay the temperature never rose above 3˚, despite bright sunshine. Betta's parents raised 12 children in North Dakota. I now understand why 11 of them left.

Was the trip worth it? Absolutely! We had a wonderful visit and spoiled the grandkids to our hearts content. I'd do it again in a minute. Grandchildren are the greatest.

What's Up on the Hill

As I write this, about half of the 2014 Legislative Session is behind us. The last day of the session is Thursday, March 13th. While most of the important decisions remain to be made, some bills have been dealt with; or not.

Federalism Training for Public Attorneys

HB120, by Rep. Ken Ivory, would require "every employee of the state or a political subdivision of the state whose job description requires that the employee be a member of the Utah State Bar" to undergo periodic training in "federalism." To quote the thoughts of a very experienced public attorney, who shall remain nameless, "The curriculum is set out in the bill and focuses on a pretty obvious political agenda,

Continued on page 3

In This Issue:

Case Summary Index

Continued from page 1

rather than neutral and relevant CLE. There is, for instance, no reference to the Supremacy Clause, the Full Faith and Credit clause or National League v. Usery. In my very humble opinion, it is an insult to public sector lawyers . . .” The bill passed out of committee with only one dissenting vote and is on the 3rd reading calendar in the House. SWAP-LAC and CIV-LAC will carefully look at the bill.

DUI & Traffic

Rep. Lee Perry’s HB303 that would have changed Utah’s DUI standard from “incapable of safely operating a motor vehicle” to Arizona’s "impaired by alcohol or drugs to the slightest degree" was not ready for prime time. It will be referred for Interim Study. We’ll see if it reappears next year.

Along those same lines, no legislator filed a .05% BAC bill.

SB128 , which would have allow seat belt violations to be enforced as a primary offense on highways with a speed of 55 mph or higher, was defeated in committee.

However, HB305 would repeal the provision in §41-6a-1806 that failure to use a child restraint device or to wear a safety belt does not constitute contributory or comparative negligence on the part of a person seeking recovery for injuries. The bill would also repeal the prohibition against introducing a failure to use a child restraint device or to wear a safety belt as evidence in any civil litigation on the issue of negligence, injuries, or the mitigation of damages. The bill is awaiting committee action.

The civil side attorneys will be interested in HB20. It is a response to a recent decision by the Utah Supreme Court that significantly increased the liability of officers who become involved in high speed chases. The bill provides that the operator of an authorized emergency vehicle “owes no duty of care to a person who is a suspect in the commission of a crime and who is evading, fleeing, or otherwise attempting to elude the operator of an authorized emergency vehicle.” The same lack of duty applies to passengers in fleeing vehicles unless the passenger can prove by a preponderance of the evidence that his or her presence in the fleeing vehicle was involuntary. The bill passed the House and is on the Senate’s 2nd reading calendar.

Theft Amendments

SB13 , amends Utah’s long standing “third theft conviction is a felony” statute. It has passed both houses and is on its way to the Governor for signing.

Forcible Entry by Police

Last month I mistakenly attributed this bill to Sen. Howard Stephenson and referred you to SB70. That was incorrect and I apologize for the error.

It is actually HB70, now HB70 Substitute, sponsored by Rep. Marc Roberts. Despite some changes from the original, the substitute bill would still significantly restrict the circumstances under which law enforcement officers may forcibly enter a building. It received a favorable vote from the House Judiciary Committee and is on the 3rd Reading Calendar in the House. The Law Enforcement Legislative Committee has made opposition to this bill one of its top priorities.

Crimes Against Persons

Revenge Porn

This refers to situations in which a person (usually a woman) has given nude and/or otherwise intimate photos to a boyfriend. After they break up the boyfriend then sends the photos to a porn site, often including the victim’s name, address and phone number. HB65 and HB71 have been combined into HB71 Substitute. The substitute bill makes the fist offense a Class A misdemeanor. Subsequent offenses are 3rd degree felonies. It has passed the House and has been sent to the Senate.

Definition of “Position of Special Trust

HB 257 would modify the definition of “A Position of Special Trust” in 76-5-404.1, Aggravated Sexual Abuse of a Child. This was made necessary by a court decision last year. The bill has passed the House and has been sent to the Senate.

Restitution

HB53 , which would enable the Juvenile Courts to retain jurisdiction of a case to monitor

Continued on page 4

Continued from page 3

and enforce restitution beyond the time when the court would otherwise lose jurisdiction, has passed the House and is awaiting action in the Senate Judiciary Committee.

HB248 Substitute. Instead of language that had raised concerns about the victim becoming a third party in a criminal case, the bill now simply amendment to 77-38-9 (1)(a) to provide:
"(1)(a) A victim of a crime may designate, with the approval of the court, a representative who may exercise the same rights that the victim is entitled to exercise under this chapter, including pursuing restitution."

Other Stuff

Rep. Paul Ray's HB 276 is a new version of previous years' attempts at legislation providing that the mere carrying of a gun "in a holster" or "encased" is not, by itself, disorderly conduct. Sounds good in the abstract but what do you do with the guy who walks into a bank with a gun, or what do you tell moms who call about a couple of "scary looking," gun packing guys hanging around on the street where their kids are playing. The problems in application are what have killed it in past years. The bill is in House Rules, awaiting assignment to a committee.

HB 268 Substitute is causing serious concern among law enforcement and prosecutors. Among its problems:

• The bill would exempt archery equipment, including crossbows, from the definition of dangerous weapon. Archery equipment can be used to kill things, can't it.
• In regard to non-firearm weapons, the bill would define "dangerous weapon" as "an item that in the manner of its unlawful use or intended unlawful use is capable of causing death or serious bodily injury."

*Just to make sure we understand, the bill then goes on to add, "Unless specifically identified elsewhere in this code, nothing other than a firearm is considered a de facto dangerous weapon, and a determination made pursuant to Subsection (6)(b) may be made only **after** an instrument, object or thing is used in an unlawful manner."*

*If the bill passes in its current form, it appears it would be legal for a restricted person to carry any non-firearm weapon until **after** he has "committing any felony or other violent criminal offense" with said non-firearm weapon.*

The bill leaves use, possession, sale or transfer of firearms by restricted persons pretty much as it has been.

SWAP-LAC has voted to oppose the bill and the LELC has made defeat of the bill a strong priority.

SB 12, which would raise the age at which one can legally use or possess tobacco in Utah to age 21, was passed out of the Senate Health and Human Services Committee with a favorable recommendation and is awaiting action by the full Senate.

SB167, Regulation of Drones, would prohibit an agent of any state or local governmental agency from operating an unmanned aerial vehicle, except in certain specified emergency situations or after issuance of a warrant for the operation of the unmanned aerial vehicle. Use of drones would be allowed if the drone is used for purposes other than a criminal investigation or intelligence gathering and the information gathered is not used in an adjudicative proceeding by any state authority. (Apparently PIs and divorce attorneys would be free to use them to spy on the other party's activities.)

The above just scratches the legislative surface. For up to date information, go to www.le.utah.gov and look up any bill in which you are interested. As always, a full legislative update will be forthcoming during the Spring Conference on April 10-11. See you there.

United States Supreme Court

Enhancement Requires But-for Cause of Death

The victim, Banka, was on an extended drug binge when he died. He had smoke marijuana and injected oxycodone before he and his wife,

Continued on page 6

PROSECUTOR PROFILE

Laina Arras
Assistant City Attorney
South Salt Lake City

Law School: BYU

Favorite Food: New Mexico red chili over homemade enchiladas with a side of rice and beans and a healthy salad .

Favorite Book : The classics

Favorite Restaurant: The Wild Grape and Café Trio are favorite brunch spots.

Favorite TV series: Lately it has been "Pit bulls and Parolees"

Favorite Hobby: The arts and her daughters' hobbies.

Laina is a South Salt Lake City prosecutor. She has been in this position three years and two months. Laina was born in Anaheim, California and grew up in Davis County. Laina wanted to be a veterinarian and then at 14 years of age after watching the news and seeing a story about a parent receiving 2 years probation after throwing a crying infant out of a two story window – decided she wanted to be an attorney who protected children.

Laina attended the U of U where she graduated with a degree in Psychology and Honors Philosophy. She then graduated from BYU Law. Her friends and family were very supportive of her decision to go to law school. Her father likes to watch her in court when she has a trial and her mother visited her once a week during law school to help with her oldest daughter who was 14 months old during her first year of law school. Also, her best friend Krissy became her live-in Nanny for the first year of law school.

Laina worked as a Juvenile Justice Services Counselor, working with juvenile delinquents in a residential community service work camp. Her first full-time legal job was as a Guardian ad litem. After being involved in the juvenile court and child welfare for 5 years, Laina was ready to take the next step in her career and prosecution seemed the natural next step. She feels it has been a perfect fit.

Laina says one of the hardest things to deal with as a prosecutor is re-trying domestic violence cases on de novo appeals. She says these are particularly hard, emotionally and mentally, for everyone involved and especially for the victims.

Laina says her most rewarding experience as an attorney was the time she convinced the judge to give a biological father 30 minutes to arrive after a shelter hearing (child welfare hearing wherein a child is being removed from his/her home) had already begun. The father had immediately left his from home in Idaho to come to Utah when he was alerted that his children were about to be removed by the State from their mother's home due to an extreme domestic violence incident. Her clients, two little boys ages 10 and 7, were anxiously waiting with her in the lobby, the oldest trying to calm the youngest and looking anxiously down the long corridor. Laina insisted that the Division give this father time to arrive as she knew he was on his way. The court clerk nearly refused to allow her and her clients to re-enter the court room believing the judge had left for the day; She begged the clerk to check and the Judge agreed to allow the father to take the children. Laina's clients, the two little boys went to the care of a safe parent and avoided DCFS custody, an experience which can be traumatizing to children. She remembers seeing the 10 year old sigh in relief as his father arrived – it was as if the weight of the world had been lifted from his shoulders.

Laina shares a funny experience saying, "My first and only Jury trial loss – a constructive possession charge – I was so surprised I asked the judge to set sentencing out because I wanted to talk to the jury. Oops, no sentencing on an acquittal."

She feels some of the most important qualities of a good prosecutor are true sense of justice; the ability to look at the facts, consider the mitigating circumstances and apply them to the law; the ability to build rapport with defense counsel; the ability to earn the respect of the court. She also says, "As prosecutors we have to be willing to consider the natural consequences that the defendant has already suffered." Laina would like to see more collaboration between mental health/treatment and prosecution so that we are getting the results we want – changed behavior. She says, "The most satisfying aspect of my job is knowing I have made a difference for good or at least tried. The least – knowing that sometimes no amount of prosecution or treatment will change the person you are trying to help."

Continued from page 4

Noragon, bought a gram of heroin from defendant. After buying the heroine the victim used it once and then was preparing another batch when Noragon went to bed. When Noragon woke up she found Banka dead and called 911. Defendant was charged with one count of distributing a controlled substance and that "death… resulted from the use of that substance," which carries a 20 year mandatory minimum under §841(b)(1)(C).

At trial, two medical experts testified that the victim's death was made more likely because he had other drugs in his system at the time of using the heroine. The U.S. Supreme Court held, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U. S. C. §841(b)(1)(C) unless such use is a but-for cause of the death or injury." The conviction was reversed and the case remanded. *Burrage v. United States*, 2014 BL 20036, U.S., No. 12-7515, 1/27/14

Utah Court of Appeals

Trial Errors Did Not Result In Reverse

Defendant and Victim were married for six years before separating. After an incident of domestic violence, Victim obtained a temporary protective order. Defendant violated the temporary protective order and Victim obtained a permanent protective order requiring defendant not to contact Victim in any way and to stay away from her address listed in the order.

Soon after the permanent protective order was issued defendant started sending letters to Victim's sister's, who lived in the same fourplex as the victim, asking them to contact Victim for defendant. Victim also found a box on her back doorstep with her wedding dress, bridesmaids' dresses, a picture of their wedding, various letters, and the bride and groom figure from their wedding cake. Defendant then called victim twice and left voicemails.

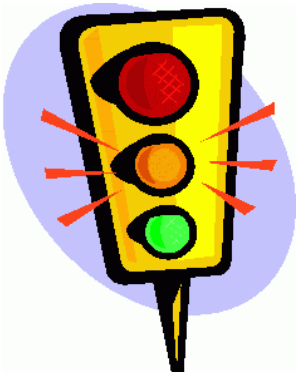
Defendant was charged with multiple counts of violating a protective order and stalking. At trial, the judge spoke about being fair and that she was once selected for jury trial and even though she was a prosecutor she felt she could be fair and answered as such during jury selection.
Defendant appealed claiming the trial court's statements to prospective jurors about the judges personal experience bolstered the state's case.

Defendant also appealed claiming prosecutorial misconduct because the prosecutor told the jury that the defense counsel's arguments were a red herring attempting to distract the jury. Lastly, defendant claimed the court's explanation about the scope of the protective order was wrong and was a reversible error. The judge stated, "[a] protective order protects the named person and the listed address," thereby prohibiting defendant from writing a letter to a non-protected person who resided at the same address.

The Utah Court of Appeals held the judge sharing her personal experience was not prejudicial, the prosecutor's description of defense counsel's argument as a red herring did not rise to the level of prosecutorial misconduct, and that the judge's explanation, while technically wrong, was harmless. Defendant's conviction was affirmed. *State v. Fouse*, 2014 UT App 29

Traffic Code Clarified

Keller and Martinez were involved in a car accident when Martinez turned left at a traffic signal and hit Keller as he was traveling through the intersection. Keller sued Martinez for negligence for damages to his vehicle and Martinez raised a negligence counterclaim in response. During trial both drivers claimed to have had the right-of-way. Both parties only presented testimony about the color of the light. The district court "reasoned that Keller needed to show that Martinez did not have a green light in order to establish that Martinez owed Keller a duty" and



Continued on page 7

Continued from page 6

"Because negligence cannot exist without a duty, the court dismissed Keller's claim." The district court then dismissed the Martinez's counterclaim on the same basis.

On appeal, Keller argued left-turning drivers must always yield to through traffic and therefore Keller's only burden was to prove that he was going straight through the intersection and that Martinez was turning left, which were both undisputed. Martinez argued section 305 of the Utah Traffic Code applies stating, "a vehicle facing a left-turn arrow "may cautiously enter the intersection . . . to make the movement indicated by the arrow" but must yield to "other traffic lawfully using the intersection."

The Utah Court of Appeals agreed with Martinez and held, Keller failed to meet his burden of proof that Martinez was negligent because section 305 applies in this instance. Because Keller failed to show he was lawfully in the intersection the district court's conclusion was affirmed. *Keller v. Martinez*, 2014 UT App 2

Court Upheld Jury Finding Of Substantial Bodily Injury

Defendant and his wife, the victim, started arguing late at night in March of 2011. Around 1:00 a.m. the victim went to bed and turned off the lights. Defendant became very upset again because the victim had turned off the lights. He went into the bedroom and screamed at the victim and she got ready to leave the house, but decided against it and went back to bed. Defendant then came to bed to go to sleep and she told him to sleep somewhere else. Defendant then became angry and took a full Gatorade bottle and hit her in the head six times. Defendant tried to jump on the victim to smother her, but the victim had kept her car keys with her for protection and held the key out and stabbed the defendant when he jumped on her. He then punched her multiple times before she fled to her mother's house and was taken to the hospital. Defendant was charged with a class A misdemeanor assault for causing substantial bodily injury.

At trial, the State sought to introduce evidence that defendant had physically attacked the victim three times in the past eight months and any evidence that would overcome any suggestion defendant was acting in self-defense. The trial court allowed the evidence to be allowed and defendant was convicted.

On appeal, defendant argued the trial court abused its discretion when it admitted other uncharged acts under rule 404(b) and that the evidence did not support the jury's finding that the victim suffered substantial bodily injury. The court of appeals held the trial court did not exceed its discretion when it determined the other acts evidence was present for the proper, noncharacter purpose of establishing the victim's fear of defendant when she armed herself with the keys, thereby helping rebut defendant's self-defense claim. The court also held that the trial court properly examined and weighed the evidence of other acts under rule 403

The appellate court also held the evidence presented at trial was sufficient for a conviction of "substantial bodily injury." The court held the testimony that the victim could not perform her job as a second grade teacher because of the swelling, bruising, and disfigurement of the injury that lasted for two weeks was sufficient. The court held reasonable minds could have found that the injuries and the time the injuries lasted amounted to "temporary disfigurement" or "protracted physical pain." The appellate court upheld the conviction. *State v. Labrum*, 2014 UT App 5

Convictions Upheld Over Errors

Defendant met with the victim, T.H., to settle a drug debt owed to T.H. T.H. had previously threatened defendant's friend over the debt. During the conversation defendant pulled out a pistol and shot T.H., killing him instantly. Defendant left in his car and was later arrested with the pistol and ammo on his person.

At trial, defendant claimed that he met T.H. in prison and knew he always carried a gun and so he brought a gun to settle the debt. Defendant claimed that during the conversation T.H. tried to take the pistol away from him and after defendant had wrestled the gun back T.H. had reached behind his back for a gun. T.H.'s girlfriend was the only other person who was present and said that T.H. never threatened

Continued on page 8

Continued from page 7

defendant and was unarmed. The jury found defendant guilty of murder.

On appeal, defendant claimed ineffective assistance of counsel and that the trial court erroneously instructed the jury about the elements of murder and manslaughter in light of defendant's claim of self-defense. Defendant claimed his trial counsel was ineffective by failing to adequately investigate the case, failing to call witnesses at trial, failing to comply with the trial court's deadlines for filing a motion in limine, and introducing the fact of defendant's prior incarceration in opening statements and witness examination.

The Utah Court of Appeals held defendant's trial counsel did provide effective assistance of counsel in each of these situations. The appellate court also held the trial court was not able to review the jury instructions for plain error because defendant's trial counsel invited the error by failing to object to the instructions. The appellate court also held that while the instruction on imperfect self-defense manslaughter was erroneous, defendant did not show he was prejudiced by his trial counsel's failure to object to the instruction. The appellate court upheld defendant's convictions. *State v. Lee*, 2014 UT App 4

Conviction Affirmed Over Prosecutorial Misconduct and Juror Bias

Defendant was convicted of ten counts of sexual exploitation of a minor based on his possession of child pornography. Defendant was convicted using circumstantial evidence. He installed a new operating system the same day the file sharing program, which was used to share the pornography, was purchased. He was the only one home when investigators came to speak with him and child pornography had been downloaded minutes before. Also, his employer's website, along with his timesheet and paycheck, was accessed minutes before child pornography was downloaded.

During trial, the prosecutor made multiple statements that were objected to by defense counsel and the objections were sustained by the trial court. The defense counsel moved for mistrial based on these statements, but the trial court denied the motion. Defendant appealed his convictions claiming prosecutorial misconduct and juror bias. The appellate court held, "Under the circumstances of this case, the trial court acted well within its discretion in concluding that there was no reasonable likelihood of a different result in the absence of the prosecutor's statements to the jury."

Also, after the trial defendant claimed that one of the jurors knew him because a family member was involved in the breakup of the marriage of the juror's brother. Both the defendant and the State submitted affidavits about the issue and the trial court found the juror had no knowledge of the defendant. The appellate court upheld the trial court's findings and defendant's convictions. *State v. Moyer*, 2014 UT App 7

City Did Not Have Knowledge Of Hole

Porter was injured when he fell into a concealed hole on the grounds of Farmington City Cemetery (the City). Porter was walking across the City's grounds when the ground below him

gave way into a hole that had been created by a leak in the sprinkler system. The leak had washed away the soil under the grass leaving an undetectable hole in the ground. Porter sued the City alleging the City was negligent in failing to exercise ordinary care to protect him from the dangerous condition presented by the hole. The trial court granted summary judgment in favor of the City.

Porter appealed claiming "(1) the City was deemed to have notice of the unsafe condition as a matter of law because the City created the condition through the operation of its sprinkler system and (2) that even if the City was not deemed to have notice as a matter of law, there was a material fact question as to whether the City had constructive notice." The appellate court held, "it is not reasonable to presume notice," and the trial court's refusal to impute notice to the City in this case was correct as a matter of law. The appellate court held the policy considerations to impute knowledge to the City are already accounted for in the law and there is no need for the court to uphold Porter's theory. The appellate court held, "The trial court correctly concluded that the City cannot be deemed to have had notice of the hole as a condition created by the City. The trial court also correctly concluded that there was no evidence to support Porter's constructive notice theory." *Porter v. Farmington City*, 2014 UT App 12

Continued on page 9

Continued from page 8

Discovery Violations Don't Require New Trial

Defendant stayed outside of his cell after being released to pick up his laundry. When the victim was released to pick up his laundry, defendant attacked him with two shanks that he had tied to his hands. Defendant had also stacked several magazines inside of his sweatshirt to act as body armor. Several guards responded to the incident and did not see the victim with any sort of weapon. A camera caught some of the fight, but not all of it.

At trial, defense counsel introduced testimony from other inmates saying they witnessed the fight and that the victim instigated it. The prosecution introduced evidence from an investigator that the showed the inmates could not see all of the fight from their prison cells. Defense counsel objected to this evidence because it had not been disclosed before trial under rule 16 of the Utah Rules of Criminal Procedure. The jury acquitted defendant of attempted murder, but convicted him of aggravated assault and two counts of possessing prison contraband. Defendant moved for a new trial, but was denied.

Defendant appealed claiming the trial court erred by denying his motion for a new trial and that the discovery violations should have resulted in a new trial. The appellate court held the prosecution did commit discovery violations by not providing photos and an investigator's report to defense counsel. However, the appellate court also found that even if the evidence had been provided by the prosecutor it would not have affected the defendant's convictions because the evidence did not contradict the evidence used to convict defendant. The appellate court affirmed the trial court's decision to deny defendant's motion for a new trial. *State v. Redcap*, 2014 UT App 10

Ineffective Assistance Of Counsel For Failing To Investigate Findings

Defendant was accused of two counts of forcible sodomy for engaging in oral sex with a sixteen-year-old girl (A.T.) when defendant was thirty two years old. The accusation arose out two nights when defendant stayed at A.T.'s home in Salt Lake city. Defendant was a long haul trucker living in Wisconsin. In 2002 defendant and a friend (Friend) were passing through Salt Lake City and stayed at A.T.'s home. A.T. reported to the police that on the second morning she and defendant had oral sex twice around 9 a.m. and then defendant left the home.

Defendant and Friend both testified defendant could not have had oral sex around 9 a.m. on the second morning because they left for Las Vegas around 6:30 a.m. and that defendant was not awake when Friend went and woke him to leave. Eventually, the time it took defendant to travel from North Dakota to Salt Lake City became an issue because defendant claimed he made the trip in about ten hours and the State had an expert used a computer program, PC*Miler, to determine the trip could not be made in under fourteen hours. Eventually defendant was convicted on both counts.

Defendant appealed claiming ineffective assistance of counsel because his counsel did not challenge the State's expert's conclusions. The appellate court held trial counsel performed deficiently by failing to investigate or challenge the qualifications of the State's rebuttal witness and the foundation for the PC*Miler report, by failing to object to the rebuttal witness's testimony, and by failing to object to the repeated instances of prosecutorial misconduct during closing argument. The convictions were reversed and remanded for a new trial. *State v. Thompson*, 2014 UT App 14

Standard For Inconsistent and Improbable Testimony Not Met

Defendant was charged with eight counts of sexual abuse of a child and four counts of lewdness involving a child after the victim reported the incident to the police. The victim and her siblings had been staying with her grandmother and defendant over the summer. The victim told her grandmother about incidents that had made her uncomfortable because defendant had showed her his penis and touched her vagina. At trial, the victim testified

Continued on page 10

Continued from page 9

defendant had touched her vagina while watching movies, had touched her inside her vagina multiple times, and had her touch his penis multiple times.

The jury believed the victim and convicted defendant on each of the twelve counts. Defendant appealed his convictions claiming insufficiency of the evidence to convict him. Defendant argued the testimony was inconsistent and improbable. Defendant argued the testimony was inconsistent because it changed between victim's initial statements and victim's testimony at trial. The court found there were no material changes to victim's testimony. The court of appeals also held, the court may choose to exercise its discretion to disregard inconsistent witness testimony only when the court is convinced that the credibility of the witness is so weak that no reasonable jury could find the defendant guilty beyond a reasonable doubt. The court also held that this standard was not met in this case and affirmed the conviction. *State v. Wells*, 2014 UT App 13

City Must Affirmatively Deny Claim For Immunity To Apply

The Winegars owned a wooded vacant parcel along Hobble Creek. Springville City (the City) decided it needed to clear obstructions from the creek streambed and the City bulldozed 100 trees on the Winegars lot to make a path to clear the obstructions. Some of the trees were growing in a maintenance easement, but many were on the Winegars private property.

The Winegars filed a notice of claim in 2006 and received notice from URMMA, an insurance company, that the claim was denied. The Winegars then brought suite against the City in 2007. The City claimed the 2007 suite ws untimely because the Governmental Immunity Act of Utah(the Act) required the Winegars to begin a civil action within one year after the denial of a claim. The Winegars contested the City had actually denied the claim because the letter denying the claim was from URMMA and did not establish that URMMA insured the City. The Court dismissed the case with prejudice.

Winegars appealed claiming the City failed to establish that it was entitled to judgment as a matter of law in its opening memorandum and that the district court erred in granting summary judgment. They also argue they were deprived the opportunity to contest a material fact set forth only in the City's reply because the court failed to grant the Winegars' motion for leave to respond to the City's reply.

The court of appeals held that because the letter the Winegar's received from URMMA required assumptions to come to the conclusion that the City had denied the claim. The appellate court held the conclusion that the City had denied the claim was not supported by fact, the City did not establish that it had denied the claim. The court of appeals vacated the grant of summary judgment in

Continued on page 11

Mark Nash, Director, mnash@utah.gov
Ed Berkovich, Staff Attorney - TSRP, eberkovich@utah.gov
Donna Kelly, Staff Attorney - SA/DVRP, dkelly@utah.gov
Marilyn Jasperson, Training Coordinator, mjasperson@utah.gov
Ron Weight, IT Director, rweight@utah.gov
Jacob Fordham, Law Clerk, jfordham@utah.gov

Visit the UPC online at
www.upc.utah.gov

Continued from page 10

favor of the City and remanded the case to the district court. *Winegars v. Springville City*, 2014 UT App 9

Doubt of Defendant's Competency Required Mid-trial Competency Hearing

Defendant was in an on and off again relationship with B.W. for years. After the relationship ended, defendant started to call B.W. and threaten her.

He also called her workplace, threatened her co-workers, and threatened to bomb the building. He also would call and demand B.W. quit her job, would be silent, and would tell B.W. he was going to kill himself if she did not come back to him.

Defendant was charged with two counts of making terroristic threats and two counts of stalking. After the first day of trial, defendant shot himself in the stomach and called 911. At court the next day, defendant's counsel informed the court of defendant's actions and that he would not be available for 30 days.

The court allowed the trial to move forward, even though defendant's counsel submitted a competency petition, and defendant was convicted of multiple charges. On appeal, defendant claimed the trial court erred in declining to hold a competency hearing, proceeding with the trial in his absence, and sentencing him.

The court of appeals held, "Defendant's history of mental illness, punctuated mid-trial with a possible suicide attempt and underscored by his attorney's assertions, raised a bona fide doubt as to defendant's competency to stand trial and therefore "require[d] further inquiry." Accordingly, the requirements of the competency statute were not satisfied." The court of appeals reversed defendant's conviction. *State v. Wolf*, 2014 UT App 18

Tenth Circuit Court of Appeals

Probable Cause Allowed Application Of Inevitable

Defendant and the victim, K.Y., met online and exchanged explicit emails and photos. K.Y. was only sixteen at the time of their correspondence. Believing that K.Y.'s father was abusive, defendant picked K.Y. up from her home in California and brought her to his home in Albuquerque. K.Y.'s family contacted law enforcement and the F.B.I. found that defendant had interacted with K.Y. and that he had driven to California and back to Albuquerque on the day K.Y. went missing. The F.B.I. contacted local law enforcement and they went to defendant's home to complete a wellness check.

One of the officer's performing the check noticed he could see through the blinds on the back of the house. When he looked through the window, the officer saw K.Y. wearing a bra and underwear, holding a rope, and smiling. Concerned for K.Y.'s safety, the deputy asked his sergeant for permission to force entry into the house and for backup. He looked again through the window and saw K.Y. no longer wearing a bra and bound by the rope, and observed camera flashes. Officers forced entry into the home without a warrant, did a protective sweep, and found pornographic materials. Officers then gave defendant Miranda warnings and spoke to him. Defendant admitted picking her up, bringing her to his house and having sex with her. Officers then obtained a warrant and searched defendant's house and found incriminating evidence. Defendant was eventually convicted of multiple charges relating to the incident.

On appeal, defendant challenged the court's application of the inevitable discovery doctrine. The U.S. Court of Appeals for the Tenth Circuit held, "Illegally obtained evidence may be admitted if it "ultimately or inevitably would have been discovered by lawful means…The government bears the burden of proving by a preponderance of the evidence that the evidence would have been discovered without

Continued on page 12

Continued from page 11

the Fourth Amendment violation." Here, the court held the officers had enough probable cause to apply the inevitable discovery doctrine because there were multiple grounds on which the officer's would have been able to legally search defendant's home. *United States v. Christy*, 10th Cir., No. 12- 2127, 1/3/14

No Expectation Of Privacy In Hotel Room After Arrest

Defendant was a Tulsa police officer whom was believed to be taking money and drugs from suspects as he arrested them. The F.B.I. investigated and set up a sting operation to catch defendant. They put an undercover officer in a hotel and wired the hotel with cameras and audio recorders and told defendant there was drug dealer in the hotel.

Defendant was recorded while arresting the undercover officer and then taking cash from the hotel room after the undercover officer was taken out of the room.

Defendant moved to suppress the recordings from the hotel room, but the motion was denied. Defendant appealed claiming the government did not have the right to record him in the hotel room because they did not have a warrant or his consent. The U.S. Court of Appeals for the Tenth Circuit held defendant did not have an expectation of privacy in the hotel room, where he was arresting drug dealer, outside the presence of the drug dealer. *United States v. Wells*, 2014 BL 1267, 10th Cir., No. 11-5162, 1/3/14

Misconduct Hearing Ordered, Appeal Denied

Defendant went to victim's home and asked for a handgun. Defendant explained that there was a predator roaming the neighborhood around his house. The victim went into his house and returned with a pistol in a bank bag and gave the pistol to defendant. Defendant turned his back to victim, then turned around and shot victim twice. Defendant then went inside the home and shot the victim's wife in the head twice. On his way out of the house defendant shot victim once more, in the head once. Miraculously, the victim survived and called police and told them defendant had come and shot he and his wife.

Defendant was charged and convicted of murder and attempted murder. At trial, one of the jurors was communicating with her husband, which was a friend of a roommate of the victim. The court took testimony of the deputy who had been escorting defendant to court and had observed the juror and her husband communicating throughout the trial. The deputy testified that it seemed that the juror would look at her husband anytime the prosecutor made a "strong point." The trial court did not hold a *Remmer* hearing and found the defendant had not been prejudiced by the juror's presence on the jury.

Defendant appealed claiming the court failed to properly investigate the circumstances surrounding the juror's communications with her husband. The U.S. Court of Appeals for the Tenth Circuit held the court erred by not holding a *Remmer* hearing to determine if defendant had been prejudiced or not. The appellate court remanded the case for the district court to conduct the hearing. The circuit court held that defendant could not expand his appeal. *Stouffer v. Trammell*, 2013 BL 355425, 10th Cir., No. 11-6293, 12/26/13

Conviction Of Escape From Home Detention Upheld

defendant was convicted of conspiracy to distribute methamphetamines and served most of his sentence in prison. The Federal Bureau of Prisons (BOP) transferred defendant to home confinement for the last four months of his sentence. Defendant agreed that he was only to go to work and home and that he needed to be home by a certain time. By agreeing to this arrangement defendant agreed to be prosecuted for escape if he failed to live by those terms.

Defendant failed to return home by the required time of night and was not able to be located by the BOP. The BOP called the Marshals and a warrant for his arrest was issued. Defendant was caught and charged with escape under 18 U.S.C. § 751(a).
Defendant motioned to dismiss the indictment arguing that § 751 did not contemplate absconding from home confinement and the district court agreed and dismissed the charges.

Continued on page 13

Continued from page 12

The U.S. Court of Appeals for the Tenth Circuit held, "To say that a prisoner is within the "custody of the Bureau of Prisons" under § 3621 while confined to his home, but not within its custody under § 751 when he escapes that confinement, defies logic. To hold otherwise would draw an arbitrary, and indeterminate, line between the statute that commits a prisoner to BOP custody (§ 3621) and the statute that ensures he remains in that custody (§ 751)." The district court's decision was reversed. *United States v. Ko*, 2014 BL 1269, 10th Cir., No. 13-3064, 1/3/14

Other Circuits/ States

Law Requiring Warrantless Search Of Hotel Records Facially Invalid

Los Angeles Municipal Code § 41.49 requires hotel and motel operators to keep records with specified information about their guests. The records must contain: the guest's name and address; the number of people in the guest's party; the make, model, and license plate number of the guest's vehicle if the vehicle will be parked on hotel property; the guest's date and time of arrival and scheduled date of departure; the room number assigned to the guest; the rate charged and the amount collected for the room; and the method of payment. Under 42 U.S.C. § 1983, motel owners in Los Angeles challenged the provision of § 41.49 which authorized warrantless, onsite inspections of those records upon demand by any police officer. The motel owners sought declaratory and injunctive relief barring continued enforcement of § 41.49's warrantless inspection provision, on the ground that it is facially invalid under the Fourth Amendment. The district court rejected plaintiffs' facial challenge and entered judgment for the City of Los Angeles.

The U.S. Court of Appeals for the Ninth Circuit held the standard to be considered reasonable is an administrative record-inspection scheme need not require issuance of a search warrant, but it must at a minimum afford an opportunity for pre -compliance judicial review. The appellate court held that according to the more lenient Fourth Amendment principles governing administrative record inspections, § 41.49 is facially invalid.
Patel v. City of Los Angeles, 9th Cir. (en banc), No. 08-56567, 12/24/13, on rehearing in 686 F.3d 1085, 2012 BL 177707, 91 CrL 588

Warrantless GPS Surveillance Prior To *Jones* Admissible

Law enforcement suspected defendant of cocaine distribution and confirmed many details of his operation through two co-defendants. During the investigation the officers installed GPS trackers on two of defendant's vehicles without warrants. Law enforcement then applied for a warrant to search one of defendant's "stash houses." The warrant was granted and officers found evidence of cocaine distribution. Defendant moved to suppress the evidence, but the motion was denied and defendant was convicted.

After his conviction, defendant moved for judgment of acquittal and a new trial. Defendant argued the same claims as what was in his motion to suppress, but also added the claim that the government's warrantless use of GPS surveillance violated his Fourth Amendment rights.

Defendant invoked *United States v. Jones*, 132 S. Ct. 945, 949 (2012) which held -- after the events at issue in this case -- that for Fourth Amendment purposes officers conducted a "search" when they installed a GPS tracker on a suspect's vehicle. Although the Court concluded that such GPS searches implicate the Fourth Amendment, it had "no occasion to consider" whether a warrantless GPS search might ever be reasonable.

The U.S. Court of Appeals for the Eleventh Circuit declined to answer that same question posed in this case, holding the *Davis* good-faith exception plainly would suspend the operation of the exclusionary rule in this case. The appellate court also held, "even if *Jones* would have rendered the warrantless searches in this case unreasonable, the officers' good-faith reliance upon [case law] renders exclusion inappropriate here." *United*

Continued on page 14

Continued from page 13

States v. Smith, 2013 BL 354489, 11th Cir., No. 12-11042, 12/23/13

Court Adopts New Test For Confrontation Clause Issues

Defendant and the victim were in rocky relationship and were uncertain about their engagement to be married. Eventually the victim found out defendant was having an affair and decided she was not going to marry defendant. Victim planned a trip to visit her mother in California on February 2, 2001. According to defendant, the night before she was to leave she packed for her trip, changed into her nightgown and went to bed.

However, she never made it to California and was reported missing. Police found her in the trunk of her car, which was parked at a health club near the couple's home. She was poorly dressed, had no makeup on, and her shoes were tied on the side of the shoe. She was also packed very strangely with empty containers, multiple hair dryers and other incidentals that didn't make sense.

Cold case detectives reviewed the case in 2007 and charged defendant with second degree murder. Multiple tests were performed on the body along with an autopsy. At trial, the prosecution had expert witnesses, chief medical examiner and a DNA expert, testify about the victim's death. Neither of the experts performed the tests that were used in their testimony. Defendant was convicted.

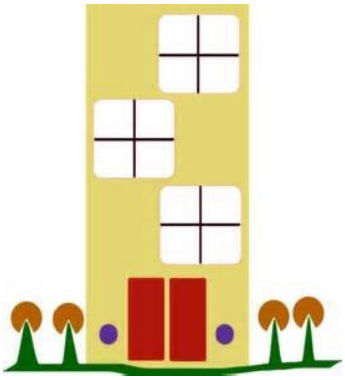
Defendant appealed his convictions claiming the testimony of the experts violated the Confrontation Clause. The Supreme Court of Washington State held that only those people who are testifying about evidence that suggests guilt of the defendant are considered witnesses. Therefore, experts who testify about a piece of evidence, such as a photograph from an autopsy, do not violate the Confrontation Clause because they are available for cross-examination. The supreme court also held DNA is not inculpatory until a human has analyzed it to determine who it belongs to. Therefore, the expert who analyzed the DNA, not the one who ran the tests, should testify at court to avoid Confrontation Clause issues. *State v. Lui*, 2014 BL 515Wash., No. 84045-8, 1/2/14

Standard For Removing Prosecutor Is Clear And Convincing

Co-defendants were indicted for multiple criminal tax offenses. They allegedly paid their employees in gold and silver coins to avoid paying payroll tax. Plaintiffs filed a *Bivens* action against the federal prosecutor complaining that the prosecutor orchestrated an illegal raid of their property and stole over $200,000.00 in cash. Prior to trial, the prosecutor commented to the defendants attorney that they had ""threatened [his] job and [his] pension," making the case "personal." The district court denied the motion ruling that the automatic disqualification was not warranted due to pendency of a *Bivens* action and that the prosecutor's comments did not require disqualification on the merits.

On appeal, defendant claimed the district court improperly applied a clear and convincing standard of proof in resolving the disqualification issue because the Supreme Court overruled *Kember* in *Young v. United States ex rel. Vuitton Et Fils*, 481 U.S. 787 (1987) (Vuitton). The U.S. Court of Appeals for the Ninth Circuit held, "that proof of a conflict must be clear and convincing to justify removal of a prosecutor from a case." The appellate court held the prosecutor's comments do not constitute clear and convicting evidence of misconduct stemming from an impermissible conflict of interest. The appellate court upheld the decision to deny the motion to disqualify the prosecutor. *United States v. Kahre*, 2013 BL 337902, 9th Cir., No. 09-10471, 12/5/13

Secured Common Hallway Not Curtilage, No Expectation of Privacy



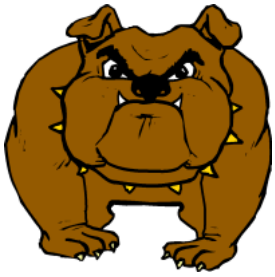
A tenant reported smelling marijuana on her floor on an apartment building. Law enforcement officers arrived, but were

Continued on page 15

Continued from page 14

unable to pinpoint the source of the odor so they planned to come back for investigation. Later an officer returned with a k-9 unit and the officer gained access to the building, which was locked, by catching the door as a tenant entered or left. The officer and the K-9 unit then walked the hallway looking for the dog to signal. The hallway was considered common shared, secure space. The K-9 unit alerted at the apartment of defendant. The officers used this information to obtain a warrant to search the apartment. When officers searched defendant's they found evidence of marijuana distribution. Defend moved to suppress the evidence claiming the basis for the search warrant was an illegal search. The motion was granted and the state appealed.

The Supreme Court of North Dakota held the locked and secured entrance to the apartment building was designed to provide security, not privacy. The court also held that tenants had no expectation of privacy, the common area of the apartment building was not curtilage, because the it was a common and shared space. The order was reversed.
State v. Nguyen, N.D., No. 20130159, 12/26/13



Protective Sweep Upheld
Police obtained a search warrant to search 922 N. Church St. lower apartment, Rockford, IL. The officers knew it was a single family dwelling that had been split into two apartments. They also knew that there were two large pit bulls guarding the home. When police executed the search warrant they entered the front door and found themselves in a small foyer with two open doors. One door led to the first floor apartment and the other led to a set of ascending stairs. One of the pit bulls was in the foyer when the police entered. It initially ran away up the stairs and then came back toward the officer. The officer shot and killed the dog on the landing of the ascending stairs. The officer then went up the stairs to perform a safety sweep and found drugs in the kitchen and a man and woman in bed in a bedroom.

The officers then executed the search warrant on the lower apartment and waited for a search warrant on the upper apartment. They obtained the search warrant from what they observed during the protective sweep. Defendant moved to suppress the evidence found from the search warrant executed on the upstairs apartment , but it was denied. Defendant was convicted of multiple charges.

Defendant appealed claiming officers entered the home illegally. The U.S. Court of Appeals for the Seventh Circuit held the facts supported the officer's protective sweep. The appellate court held that the officer had a reasonable articulable suspicion that there might be danger in the upper apartment and so he conducted a proper protective sweep. The judgment was affirmed. *United States v. Starnes*, 2013 BL 354380, 7th Cir., No. 13-1148, 12/23/13

Statute Outlawing Misleading Spam Constitutional
Defendant was charged with multiple crimes relating to a conspiracy to defraud telecommunications companies out of money and property. Defendant created shell companies to contract with telecommunications companies to receive goods and services. Defendant would then not pay and change the name of the company and his alias to be able to defraud the company again. Defendant would use alias and provide false credit reports, postal information, financial statements, and invoices. Defendant was convicted and received a sentence before appealing.

On appeal defendant claimed the statute was unconstitutional because it was vague and restricted freedom of speech. The U.S. Court of Appeals for the Fifth Circuit held that while commercial speech is protected by the constitution because "the statute specifically targets and punishes only unprotected, intentionally misleading commercial speech, and thus excludes commercial speech that is not misleading and all political or charitable speech, we conclude that it is not facially vague or overbroad." *United States v. Simpson*, 2014 BL 11579, 5th Cir., No. 12-10574, 1/15/14

Continued on page 16

Continued from page 15

Drug Dog's Field Record Does Not Absolutely Eliminate Probable Cause

Defendant was pulled over in Virginia for having an obscured license plate and too dark of a window tint. The officer had defendant get out of the car and stand by his patrol car while he ran his license plate. The officer engaged defendant in conversation about where he had been and where he was going. The officer asked about his criminal history and asked dispatch to find defendant's criminal history. The officer found out Defendant had a restraining order against him and that he had convictions or charges of homicide, weapons violations, robbery, kidnapping, and terroristic threats. The officer had a drug dog complete a free-air sniff around the vehicle and the dog alerted to the presence of narcotics. The officers searched the car based on the dog's alert and found over one kilogram of cocaine and $7,000 in cash.

Defendant moved to suppress the evidence claiming both that the duration and delay of the stop was unconstitutional and that the dog's field performance was so poor that he could not provide probable cause. The district court denied both of these reasons to suppress the evidence. On appeal, defendant raised the same arguments. The U.S. Court of Appeals for the Fourth Circuit held, "Probable cause to conduct a search based on a drug-detection dog's alert exists when the totality of the circumstances, "viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." The appellate court held that because the State provided ample evidence that the dog had been certified and had performed well in controlled training situations was enough to show the officer had probable cause to believe that illegal drugs would be found by searching the car. The judgment was affirmed. *United States v. Green*, 2014 BL 13536, 4th Cir., No. 12-4879, 1/17/14

Sexual Orientation Receive Heightened Scrutiny and *Batson* Challenges Apply

SmithKline Beecham (GSK) claimed that Abbott Laboratories (Abbott) violated the implied covenant of good faith and fair dealing, the antitrust laws, and North Carolina's Unfair Trade Practices Act by first licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own, combination drug.

During jury selection Abbott used a peremptory strike against the only self-identified gay member of the venire. GSK challenged that strike under *Batson* arguing the strike was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held classifications based on sexual orientation are subject to heightened scrutiny and that equal protection prohibits preemptory strikes based on sexual orientation. The Circuit Court held, "Because a *Batson* violation occurred here, this case must be remanded for a new trial." *SmithKline Beecham Corp. v. Abbott Labs*, 2014 BL 15967, 9th Cir., No. 11-17357, 1/21/14

Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 10-11	SPRING CONFERENCE *Legislative and case law updates, civility/professionalism and more*	Sheraton Hotel Salt Lake City, UT
June 18-20	UTAH PROSECUTORIAL ASSISTANTS ASSN. ANNUAL CONFERENCE *Training for non-attorney staff in prosecutor offices*	Location TBA Wasatch Front
July 31 - August 1	UTAH MUNICIPAL PROSECUTORS ASSN SUMMER CONFERENCE *Training for city prosecutors and others who carry a misdemeanor case load*	Crystal Inn Cedar City, UT
August 18-22	BASIC PROSECUTOR COURSE *Trial advocacy and substantive legal instruction for new prosecutors*	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE *The annual CLE and idea sharing event for all Utah prosecutors*	Courtyard by Marriott St George, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE *Training designed specifically for civil side attorneys from counties and cities*	Zion Park Inn Springdale, UT
November	ADVANCED TRIAL SKILLS COURSE *For felony prosecutors with 3+ years of prosecution experience*	Location TBA Salt Lake Valley

NATIONAL CRIMINAL JUSTICE ACADEMY

(NDAA will pay or reimburse all travel, lodging and meal expenses - just like the old NAC)

March 10-14	TRIAL ADVOCACY I Summary Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
May 12-16	TRIAL ADVOCACY I Summary Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
June 9-13	TRIAL ADVOCACY I Summary Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT
July 7-11	TRIAL ADVOCACY I Summary Agenda Application *Hands on trial advocacy training for prosecutors with 2-3 years experience*	Salt Lake City, UT

Calendar

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

March 10-14	PROSECUTING DRUG CASES Flyer Summary Registration *A course for the whole team; prosecutors and law enforcement officers*	Ft Lauderdale, FL
March 25-27	PROSECUTING DEATH PENALTY CASES Flyer Registration	Memphis, TN
April 1-4	EQUAL JUSTICE FOR CHILDREN Summary Agenda Registration *This course is designed for those beginning a career as a child abuse professional*	Grand Rapids, MI
May 19-23	childPROOF Summary Application *Advanced Trial Advocacy for Child Abuse Prosecutors. There will be no attendance fee for this course. Only 30 prosecutors will be selected to attend.*	Washington, DC
June 2-6	OFFICE ADMINISTRATION Agenda Summary Registration *For Chief Prosecutors, First Assistants, Supervisors of Trial Teams and Administrative Professional Staff*	Salem, MA
June 16-25	CAREER PROSECUTOR COURSE Flyer Registration *NDAA's flagship course for those who have committed to prosecution as a career*	San Diego, CA
June 23-27	INVESTIGATION & PROSECUTION OF CHILD PHYSICAL ABUSE & FATALITIES Summary Registration	Baltimore, MD
June 23-27	UNSAFE HAVENS I (registration link forthcoming) *Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation. No registration fee for this course, which will be taught at AOL headquarters campus.*	Dulles, VA
July 14-17	ChildProtect Summary Agenda Application *Trial Advocacy for Civil Child Protection Attorneys. By application only. 30 attys. will be selected to attend*	Winona, MN
November	UNSAFE HAVENS II (registration link forthcoming) *Advanced Trial Advocacy for Prosecution of Technology Facilitated Crimes Against Children. No registration fee for this course. The course is by application and only 30 prosecutors will be selected to attend.*	Dulles, VA

* For a course description, click on the "Summary" link after the course title. If an agenda has been posted there will also be an "Agenda" link. Registration for all NDAA courses is now on-line. To register for a course, click on the "Register" link. If there are no links, that information has yet to be posted by NDAA.